

BLUMENFELD & COHEN
SUITE 300
1625 MASSACHUSETTS AVENUE, NW
WASHINGTON, DC 20036

202.955.6300
FACSIMILE 202.955.6460
<http://www.technologylaw.com>

DOCKET FILE COPY ORIGINAL

SUITE 1170
4 EMBARCADERO CENTER
SAN FRANCISCO, CA 94111
415.394.7500
FACSIMILE 415.394.7505

January 31, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B-204
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Comments of Rhythms NetConnections Inc.; CC Docket No. 00-4

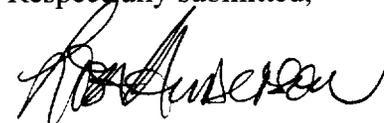
Dear Ms. Salas:

Pursuant to the Commission's Public Notice (DA 00-37) dated January 10, 2000, we are filing today, on behalf of Rhythms NetConnections Inc. ("Rhythms"), the following documents: (1) a single copy of the portions of Rhythms' Comments containing confidential information (with a cover letter stamped "Confidential—Not for Public Inspection"); (2) one original and two copies of the entire submission with confidential information redacted (with a cover letter stamped "Redacted—For Public Inspection"). Enclosed with the redacted version is a 3.5" computer diskette with the document in Word 97 read-only format.

As indicated on the attached service list, copies of Rhythms' Comments are being served on the Texas Public Utilities Commission and on the Department of Justice.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Respectfully submitted,



Lisa N. Anderson

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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, and) CC Docket No. 00-4
Southwestern Bell Communications Services,)
Inc. d/b/a Southwestern Bell Long Distance)
for Provision of In-Region, InterLATA)
Services in Texas)

COMMENTS OF RHYTHMS NETCONNECTIONS INC.
IN OPPOSITION TO APPLICATION
OF SOUTHWESTERN BELL CORPORATION
FOR PROVISION OF IN-REGION INTERLATA SERVICES IN TEXAS

REDACTED—FOR PUBLIC INSPECTION

Jeffrey Blumenfeld
Chief Legal Officer, General Counsel
Rhythms NetConnections Inc.
6933 South Revere Parkway
Englewood, Colorado 80112
303.476.4200
303.476.4201 facsimile
jeffb@rhythms.net

Anita C. Taff-Rice
Christy C. Kunin
Larry Blosser
Lisa N. Anderson
Blumenfeld & Cohen – Technology Law Group
1625 Massachusetts Ave., N.W., Suite 300
Washington, D.C. 20036
202.955.6300
202.955.6460 facsimile
christy@technologylaw.com

Dated: January 31, 2000

SUMMARY

There is no dispute that the Telecommunications Act of 1996 (“1996 Act”) and the requirements of sections, 251, 252 and 271 apply to a Bell Operating Company’s (“BOC’s”) obligation to open its networks to the competitive provision of advanced services, including those utilizing Digital Subscriber Line (“DSL”) technologies. In the last three years, this Commission has repeatedly and forcefully stressed the critical importance and public interest served by competitive provision of advanced services. Indeed, the Commission has stressed that its evaluation of a BOC’s section 271 application will include an assessment of nondiscriminatory provisioning and performance with regard to DSL. With the SBC application, the time has come for the Commission to ensure that its policies to promote advanced services are not ignored.

Nowhere has the promise of the Act to bring innovative new services to the market been more realized than in the advanced services arena. Competitive providers like Rhythms have spurred the deployment of DSL nationwide, giving American consumers higher quality broadband connectivity at a reasonable price. Sadly, nowhere in the country have data CLECs providing DSL services had to fight harder for less than in Texas. Indeed, SBC could not present a single approved interconnection agreement that contains rates, terms and conditions for obtaining loops and OSS for xDSL services. In every other part of the country, except SWBT’s five-state territory, Rhythms has been able to obtain an agreement with the incumbent carrier for DSL-capable loops. Not so in SBC’s Texas. On this basis alone, the Commission should conclude that SBC has failed to meet its checklist obligations.

Moreover, a review of the evidence submitted by SBC reveals conclusively that what little DSL competition there is in Texas suffers blatant unmitigated discrimination compared to

SBC's retail DSL operations. SBC has ignored this Commission's explicit admonition to provide xDSL-specific performance data to demonstrate nondiscrimination. Rather, SBC has elected to mask its pitiful xDSL performance by hiding the data in its overall checklist performance data. As Rhythms demonstrates, however, SBC's performance on DSL is deplorable. For example, the OSS systems for DSL-capable loops are wholly inadequate and discriminatory. Unlike the SBC retail operations, competitive DSL providers have no present electronic access to necessary pre-ordering loop make-up data, and are forced instead to rely on incomplete information provided through lengthy manual processes. Similarly, unlike the SBC retail systems, competitive DSL providers' orders are processed manually with no flow-through. Loop orders are routinely rejected through no fault of the ordering CLEC. There is little question that the SBC affiliate ASI is not yet "fully operational," yet SBC has failed to present conclusive evidence of nondiscriminatory DSL loop provisioning through established performance standards and measurements or actual extensive commercial experience. The testing performed by Telcordia was inconclusive and lacks credibility.

Further, SBC's application should also be rejected under the public interest standard. A review of the competitive landscape reveals that SBC's refusal to provide data CLECs with necessary UNEs has enabled SBC to leverage its monopoly over the local loop into the DSL market. While refusing to provision loops for data carriers, SBC launched its own DSL offering and successfully obtained a vast share of the Texas market. In every respect, SBC has used its monopoly to forestall DSL competition. Removing the carrot of § 271 before SBC has conclusively demonstrated that it has fully and irreversibly opened the data services market to competition would not only disserve the public interest but allow SBC to effectively vitiate the

many procompetitive advances made by this Commission over the last year for advanced services. The Commission must reject SBC's § 271 application at this time.

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APPENDIX:

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<u>Attachment 1</u> : Joint Affidavit of Ann Lopez and Fred Baros on Behalf of Rhythms Links Inc. (“Lopez-Baros Aff.”)	Qualifications of Ann Lopez and Fred Baros	¶¶ 1-2
<u>Attachment 1</u> : Lopez-Baros Aff	Purpose of the Affidavit	¶ 3
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<u>Attachment 1</u> :Lopez-Baros Aff	Access to xDSL-Capable Loops	¶¶ 20-22
<u>Attachment 2</u> :	<i>Petition of Accelerated Connections, Inc. d/b/a ACI Corp. For Arbitration to Establish An Interconnection Agreement with Southwestern Bell Telephone Company, et al., Docket Nos. 20226. 20272, Order No. 5 Interim Order (Apr. 26 1999)</i>	Pages 1-4
<u>Attachment 3</u>	SBC Press Release, “Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access” (Jan. 12, 1999)	Pages 1-2
<u>Attachment 4</u>	Arbitration Award, Petition of Rhythms Links, Inc. For Arbitration To Establish An Interconnection Agreement With Southwestern Bell Telephone Company/Petition of DIECA Communications, Inc. d/b/a Covad Communications Company For Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements With Southwestern Bell Telephone Company, Docket No. 20226/20272 (November 30, 1999)	Pages 1-121
<u>Attachment 5</u>	Texas PUC Open Meeting, 7 Project 16251, Transcript (July 15, 1999)	Pages 104, 293-299
<u>Attachment 6</u>	SWBT Request for Briefing and Rehearing on Arbitration Award (Dec. 7, 1999)	Pages 1-6

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<u>Attachment 7</u>	Comments of Southwestern Bell Telephone Company Concerning Arbitration Award and Proposed Interconnection Agreements (Jan. 6, 2000)	Pages 1-22
<u>Attachment 8</u>	T2A Agreement	Pages 1-13
<u>Attachment 9</u>	E-mail from Mari Quick, Corp. Manger of Product Development Jan. 14, 1999	Pages 1
<u>Attachment 10</u>	Texas Public Utility Commission, <i>Petition Of Accelerated Connections, Inc. d/b/a/ ACI Corp. For Arbitration To Establish An Interconnection Agreement With Southwestern Bell Company</i> , Docket No. 20226/20272, Order No. 20, at ¶ 4 (July 26, 1999)	Pages 1-39
<u>Attachment 11</u>	Interim Agreement Between Southwestern Bell Telephone Company and Accelerated Connections, Inc., (June 2, 1999)	Pages 1-8
<u>Attachment 12</u>	Southwestern Bell Telephone Company's Appeal of Order No. 5 Interim Order, <i>Petition of Accelerated Connections, Inc., d/b/a ACI corp. for Arbitration to Establish an Interconnection Agreement With Southwestern Bell Telephone Company</i> , Docket Nos. 20226 and 20272 (May 11, 1999)	Pages 1-8
<u>Attachment 13</u>	SBC and CLEC xDSL Collaborative, January 19, 2000, Synopsis of Issues by Category	Pages 1-20
<u>Attachment 14</u>	Texas Arbitration, ACI, Exh 149, Bird Transcript	Pages 1, 45-47, 60-62
<u>Attachment 15</u>	Texas Arbitration, ACI Exh. 149 Phillips Transcript	Pages 1, 71-78
<u>Attachment 16</u>	Texas Arbitration, ACI Exh. 149, Talbot Transcript	Pages 1, 71-73
<u>Attachment 17</u>	Southwestern Bell Telephone Company's Explanation of Submitted Proposed Language (Jan. 5, 2000)	Pages 1-8
<u>Attachment 18</u>	Accessible Letter, xDSL Capable Loops: Current Loop Qualification and Order Processes – Arkansas, Kansas, Missouri, Oklahoma, Texas,” January 4, 2000, Number CLEC00-003	Pages 1-22
<u>Attachment 19</u>	Texas PUC Open Meeting Transcript (Nov. 4, 1999)	Pages 1, 193-196, 209-212
<u>Attachment 20</u>	Letter of Rhythms Links to Pat Wood, <i>Investigation Into Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Market; Operations Support Testing Commission Relating to The Investigation into Southwestern Bell Telephone Company's Entry in the InterLATA Telecommunications Market in Texas</i> , Docket Nos. 16251, 20000 (Oct. 21, 1999)	Pages 1-3

DOCUMENT	SUBJECT MATTER	LOCATION
<u>Attachment 21</u>	Supplemental Affidavit of Eric H. Geis On Behalf of Rhythms Links, Inc., In Response to the Commission's November 5, 1999 Memorandum, ¶ 21, submitted November 22, 1999 in conjunction with the Texas PUC's public interest examination of SBC's 271 application	Pages 1-22
<u>Attachment 22</u>	Comments of NorthPoint Communications to The Public Utility Commission of Texas Southwestern Bell Operations Support Systems Interim Report, <i>Operations Support Testing Relating to the Investigation into Southwestern Bell Telephone Company's Entry Into the InterLATA Telecommunications Market In Texas</i> , Public Utility Commission of Texas, Project No. 2000 (Aug. 2, 1999).	Pages 1-8
<u>Attachment 23</u>	SBC Press Release, "SBC First to Surpass 100,000 DSL Subscribers, November 4, 1999, San Antonio, Texas	Pages 1-6
<u>Attachment 24</u>	Texas Arbitration, ACI Exh. 149 Vinyard Transcript	Pages 1, 101-114

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, and) CC Docket No. 00-4
Southwestern Bell Communications Services,)
Inc. d/b/a Southwestern Bell Long Distance)
for Provision of In-Region, InterLATA)
Services in Texas)

**COMMENTS OF RHYTHMS NETCONNECTIONS INC.
IN OPPOSITION TO APPLICATION
OF SOUTHWESTERN BELL CORPORATION
FOR PROVISION OF IN-REGION INTERLATA SERVICES IN TEXAS**

Rhythms NetConnections Inc., and Rhythms Links Inc. (formerly ACI Corp.)¹

(collectively “Rhythms”) hereby submits these comments in opposition to the application of SBC Communications Inc., Southwestern Bell Telephone Company (“SWBT”) and Southwestern Bell Communications Services, Inc. (collectively, “SBC”) for authority to provide in-region, interLATA services in Texas.

INTRODUCTION

The Federal Communications Commission (“FCC” or “Commission”) has repeatedly stressed the need to promote the widespread availability of advanced services.² To ensure that

¹ In the Texas 271 proceeding and in its arbitration with SWBT, Rhythms participated through its subsidiary ACI Corp., which became Rhythms Links Inc. Rhythms’ experience with SWBT in Texas are set forth in the Affidavit of Ann M. Lopez and Fred Baros (appended as Attachment 1) (“Lopez-Baros Aff/Attachment 1”).

² *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Memorandum Opinion and Order, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91 (Aug. 7, 1998) (“*Advanced Services Order*”) ¶¶ 1, 11, 49; *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications*, First Report and Order, CC Docket No. 98-147, FCC 99-48 (rel. Mar. 31, 1999) (“*Advanced Services First Report and Order*”) ¶ 13; *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 98-147, and Fourth Report and Order, CC Docket No. 96-98 (rel. Dec. 9, 1999) (“*Line Sharing Order*”) ¶ 1.

the Bell Operating Companies (“BOCs”), such as SBC, fully and irreversibly open their advanced services market to competition, this Commission has concluded that advanced services should be included in any evaluation of a BOC § 271 application.³ These policies promote the public interest by bringing broadband services to residential and small business consumers.⁴

Although SWBT claims to have opened its local market to competition, those claims are wholly unsubstantiated with respect to xDSL-based advanced services. Indeed, Rhythms has been seeking, for more than 20 months, to enter into a permanent interconnection agreement with SWBT, and has met with resistance at every turn. As a direct result of SWBT’s refusal to meet its statutory obligations, there is very little DSL competition in Texas.

SWBT has repeatedly delayed, forestalled and impeded every effort on the part of Rhythms and other DSL CLECs to obtain interconnection and access to unbundled network elements. Only when directed to do so by the Texas commission did SWBT finally enter into an interim interconnection agreement that allowed Rhythms and others to begin providing competitive DSL services in Texas.

The Commission has clearly and unequivocally declared that a BOC seeking § 271 authorization to enter the interLATA market will be evaluated on its actual performance, based on the record in existence on the date the application is submitted. Mere paper promises of

³ *In The Matter of Application by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Services in the State of New York*, CC Docket No. 99-295, FCC 99-404 (rel. Dec. 22, 1999) (“*BA-NY 271 Order*”) ¶ 330. Indeed, the Department of Justice (“DOJ”) concluded that BA-NY’s failure to meet the checklist requirements for DSL providers constituted a failure to meet the checklist. *In the Matter of Application of New York Telephone Company (d/b/a/ Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York*, Evaluation of the United States Department of Justice, CC Docket No. 99-295 (Nov. 1, 1999) at 2-3, 26-28.

⁴ “[W]e are convinced that line sharing will level the competitive playing field and enable requesting carriers to accelerate the provision of voice-compatible xDSL-based services to residential and business customers who, to date, have not had the same level of access to competitive broadband services as larger businesses.” *Line Sharing Order* ¶ 35.

future performance are not acceptable substitutes for actual compliance. Notwithstanding the FCC's clear statements detailing the § 271 requirements, SWBT's application relies extensively (and, in the case of DSL, almost exclusively) on mere paper promises. SWBT has not met its burden of producing evidence sufficient to show that it presently meets each of the requirements of § 271, including actual performance of each of the items of the 14-point competitive checklist, particularly for items essential to provision of advanced services.

As will be detailed below, SWBT has failed to meet the competitive checklist requirements with respect to several items that are vitally important to data CLECs. Specifically, SWBT has not provided nondiscriminatory access to operations support systems ("OSS"), and has failed to demonstrate that data CLECs have nondiscriminatory access to unbundled xDSL-capable loops. Finally, SWBT has not detailed how it intends to comply with its obligations to provide nondiscriminatory access to line-sharing, despite the fact that the Commission's *Line Sharing Order* will become effective in early February while SWBT's application is pending before the Commission.

The Commission should reject SBC's effort to analogize itself to Bell Atlantic, as well as attempt to compare the Texas Public Utilities Commission's ("Texas PUC's") limited review of SWBT's § 271 application to the New York Public Service Commission's ("NY PSC's") extensive analysis of the Bell Atlantic's application. SBC has been, by far, the most resistant of the regional BOCs to the entry of DSL CLECs. SBC's efforts to slow-roll DSL competitors have been extraordinarily successful. In fact, SBC had only provisioned 960 DSL loops for CLECs in the entire state of Texas by the end of 1999. Nor can the Texas PUC's limited review of SBC's § 271 application be reasonably be compared to the NY PSC's lengthy and exhaustive review of the Bell Atlantic application, which encompassed several phases extending over a

three-year period, including extensive third-party OSS testing conducted by an independent auditing firm, KPMG Peat Marwick.

One of the primary goals of the 1996 Act⁵ and this Commission's policies is to ensure that new markets develop with a choice of providers and technologies.⁶ Yet as a direct consequence of SBC's refusal to meet its obligations to provide UNEs in a nondiscriminatory manner, Rhythms and other data CLECs have been seriously impeded in their efforts to provide advanced services to Texas consumers.⁷ Further, while standing squarely in the way of data CLEC entry, SBC embarked on a rapidly scalable roll-out of its own DSL offering, which it launched in January 1999.⁸ The anticompetitive refusal of SBC to discharge its § 271 obligations has enabled SBC to leverage its monopoly to limit DSL competition.

The Commission must not permit SWBT to avoid responsibility for meeting its § 271 obligations to DSL CLECs. In Texas, no "unique circumstances"⁹ exist that are comparable to those cited by the Commission in approving Bell Atlantic's New York application. In Texas, DSL issues were raised more than a year ago, in a September 11, 1998 collaborative work session on DSL issues conducted as a part of the Texas 271 proceeding.¹⁰ SWBT has absolutely

⁵ Telecommunications Act of 1996, Pub. L. 104-104, Feb. 8, 1996 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* ("1996 Act").

⁶ *Advanced Services Order* ¶ 1 ("One of the fundamental goals of the Telecommunications Act of 1996 is to promote innovation and investment by all participants . . . in order to stimulate competition for all services, including advanced services.").

⁷ The Texas PUC made this specific finding in April when it ordered SWBT to provide Rhythms with a rudimentary interim interconnection agreement so that Rhythms could begin ordering collocation in Texas. *Petition of Accelerated Connections, Inc. d/b/a ACI Corp. For Arbitration to Establish An Interconnection Agreement with Southwestern Bell Telephone Company, et al.*, Docket Nos. 20226, 20272, Order No. 5 Interim Order (Apr. 26 1999) ("*Order Requiring Interim Agreement/Attachment 2*") (appended as Attachment 2).

⁸ SBC Press Release, "Southwestern Bell Plans Major Launch of New Lightning-Fast Service for Data, Internet Access" (Jan. 12, 1999) ("SBC New Launch Press Release/Attachment 3") at 1 (appended as Attachment 3).

⁹ *BA-NY 271 Order* ¶ 322.

¹⁰ A second collaborative session on DSL was held ten months later, on July 15, 1999.

no claim that it should be excused by any circumstances from meeting *all* of the requirements of § 271.

Congress established an explicit statutory rubric to ensure that the 1996 Act would lead to competition in *all* telecommunications services.¹¹ By enabling competition, Congress hoped to ensure that American consumers would reap the benefits of increased innovation, choice and price discipline. Advanced services, such as xDSL, are precisely the kind of competition the Act envisions. Accordingly, the only way the FCC can conclude — consistent with Congressional intent and its own policies — that a BOC has met the checklist is to conclude that SWBT has actually eliminated the road blocks to competition for advanced services.

SWBT's application falls far short of meeting the requirements of Section 271, particularly with respect to checklist items that are critically important for creating effective and lasting competition for advanced services, such as DSL. Recognizing the public interest benefits that will accrue if broadband services are offered by many firms, the Commission has declared its intention to prevent the broadband market from becoming a monopoly or duopoly.¹² Granting SWBT authority to provide long distance service in Texas despite its continuing refusal to meet its statutory obligations to DSL CLECs will only perpetuate SWBT's monopoly power. Accordingly, the Commission should reject SWBT's application.

BACKGROUND

A. The Importance of the DSL Market and Rhythms' Role

As the Commission recently observed in an order issued just over a month ago:

[D]igital subscriber line technologies are making it possible for ordinary citizens to access various networks, such as the Internet, corporate networks, and

¹¹ "Congress provided the blueprint in the 1996 Act for ensuring that all markets are open to competition, while encouraging the rapid deployment of new telecommunications technologies." *Advanced Services Order* ¶ 1.

¹² *Advanced Services Order* ¶ 50.

governmental networks, at high speed through the existing copper telephone lines that connect their residences or businesses to the incumbent local exchange carriers' (LEC's) central office. The existing infrastructure is beginning to be used in new ways that make available to average citizens a variety of new services and vast improvements to existing services. The ability of all Americans to access these high-speed, packet-switched networks will spur the growth and development of our nation.¹³

Rhythms is one of a number of competitive local exchange carriers (“CLECs”) using xDSL technologies to provide high speed (or “broadband”) data services to residential and business customers.¹⁴ xDSL services are currently provided predominately over the existing copper wire loop network of the incumbent LECs. Rhythms currently provides xDSL services in 38 markets, covering 69 Metropolitan Statistical Areas (MSAs). Rhythms and other CLECs are dependent upon SWBT and other incumbent LECS for the provision of unbundled DSL-capable loops, transport, interconnection and collocation of network facilities.

The Commission has recognized that “the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services.”¹⁵ The Commission has also vowed to promote consumer welfare through entry by many competitors into the market for broadband facilities and services to “fight any attempt to make residential broadband [a monopoly or duopoly].”¹⁶ In other words, neither the interests of consumers nor the procompetitive goals of the 1996 Act would be well-served if SWBT were allowed to leverage

¹³ *Line Sharing Order* ¶ 2; see also *Advanced Services Order* ¶¶ 6-7.

¹⁴ *Lopez-Baros Aff/Attachment 1* ¶ 7.

¹⁵ *Advanced Services Order* ¶ 11.

¹⁶ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Report, CC Docket No. 98-146, FCC 99-5 (Feb. 2, 1999) ¶ 50.

its voice monopoly to dominate advanced services.¹⁷ In order to ensure that this does not happen, it is vital that the FCC insist that BOCs, including SBC, have fully complied with the § 271 checklist for carriers offering advanced services. Otherwise the competitive provision of xDSL and other broadband technologies will be stymied not only in Texas but throughout the United States.

B. Texas 271 Proceeding

SWBT filed its 271 application with the Texas PUC on March 2, 1998.¹⁸ The Texas PUC conducted only two one-day collaborative sessions dealing with DSL issues as part of the § 271 review. Rhythms actively participated in the first DSL collaborative work session held on September 11, 1998, which addressed all the terms and conditions, OSS and rates for xDSL technologies.¹⁹ Rhythms has been directly involved in every aspect of DSL policy in Texas, while simultaneously pursuing an interconnection agreement with SWBT.²⁰ After months of

¹⁷ “[G]iven the formative stage of the advanced services market and the importance of ensuring the development of competition in the provision of advanced services by multiple providers, we scrutinize carefully the possibility of an increase in incentive and ability to discriminate against competitive providers of such services.” *In Re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (rel. Oct. 8, 1999)(“SBC/Ameritech Merger Order”) ¶ 210.

¹⁸ The Texas PUC, in anticipation of SWBT’s 271 filing, adopted an order establishing procedures for the 271 proceeding on December 18, 1996. See Order Establishing Procedures, Project No. 16251, *Investigation of Southwestern Bell Telephone Company’s Entry Into the Texas InterLATA Market* (Dec. 18, 1996) (“Texas PUC/271 Docket”).

¹⁹ The Texas PUC conducted other collaborative workshops that dealt with negotiation of Attachment 25 of the SWBT Proposed Interconnection Agreement. These workshops, however, were geared towards determining if the parties could reach some consensus on an agreement for a DSL attachment. Additionally, the topic of DSL arose in other collaborative sessions, such as Performance Measurements. With the exception of the two collaborative workshops specifically dealing with DSL, however, there was relatively little time spent on DSL issues in comparison to the other issues addressed in the collaborative processes.

²⁰ Rhythms successfully negotiated 24 Interconnection Agreements with all other major incumbent local exchange carriers, including SBC-owned Pacific Bell, allowing Rhythms to begin to offer xDSL service in other states. While the terms of these agreements vary, each of the other twenty-four (24) negotiated agreements with six other major ILECs allows Rhythms to provide a full range of DSL services. SWBT is the only ILEC with whom Rhythms was forced into arbitration due primarily to the absolute refusal of SWBT to provide xDSL-capable loops in compliance with § 251(c)(3).

failed negotiations, Rhythms filed for arbitration with the Texas PUC.²¹ The disputed issues in the arbitration covered *every* aspect of the terms, conditions, operational support systems, and rates for provisioning xDSL technologies in Texas. During the pendency of the arbitration, the Texas PUC decided that no collaborative sessions or discussions regarding the rates, terms or conditions for DSL would occur in the 271 proceeding.

Ultimately, a second and final collaborative session on DSL was held ten months after the first such session to discuss how the interested parties could address DSL issues through a DSL amendment or attachment to SWBT's standard interconnection agreement.²² Although SWBT proffered such a DSL Attachment in its Proposed Interconnection Agreement,²³ the terms were wholly inadequate to allow data CLECs a meaningful opportunity to compete. The data CLECs²⁴ submitted redlined versions of SWBT's DSL Attachment (Attachment 25) on June 10,

²¹ Subsequently, Covad Communications, Inc. filed for arbitration of DSL issues, and the Texas PUC consolidated the Rhythms and Covad proceedings. *See* Arbitration Award, Petition of Rhythms Links, Inc. For Arbitration To Establish An Interconnection Agreement With Southwestern Bell Telephone Company/Petition of DIECA Communications, Inc. d/b/a Covad Communications Company For Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements With Southwestern Bell Telephone Company, Docket No. 20226/20272 (November 30, 1999) at 3 (“*Texas Arbitration Award/Attachment 4*”) (appended as Attachment 4).

²² From the time of the second collaborative session, Rhythms also expressed, on numerous occasions that the issues that the parties were being asked to negotiate in the 271 context were specifically issues in dispute in the pending Rhythms/Covad arbitration. At that session, SWBT sought to have issues decided in the 271 proceeding that would then be “precedent” for the arbitration. Rhythms opposed this and, ultimately, the Texas PUC Staff rejected SWBT's approach. However, the Texas PUC required the parties to prepare an “interim” DSL Attachment until the completion of the Rhythms/Covad arbitration. This attachment will be replaced with the terms of the arbitration. Texas PUC Open Meeting, Project 16251, Transcript of July 15, 1999 (“July 15 Open Meeting Transcript/Attachment 23”) (appended as Attachment 5) at 295.

²³ SWBT's Proposed Interconnection Agreement was the predecessor of the Texas 271 Agreement or “T2A.”

²⁴ The DSL CLECs included Rhythms, Covad, NorthPoint Communications, MCIWorldCom, Sprint, AL TSA, IP Communication, Intermedia Communications, NEXTLINK, and JATO Communications.

1999 and then again on June 24, 1999.²⁵ Because the Texas PUC Staff found SWBT's attachment wholly unacceptable, and because the parties' positions were so far apart, the Staff determined that a more suitable attachment would be created by replacing SWBT's attachment with the DSL Appendix from the Arbitration Award.²⁶ Thus, until the Rhythms/Covad Arbitration is final,²⁷ and CLECs negotiate a final 271 interconnection agreement with SWBT, the only currently available DSL terms and conditions are the Texas PUC-rejected terms proffered by SWBT.²⁸

C. SBC's Assurances Should be Evaluated in Light of An Ongoing Pattern of Anticompetitive Conduct

Compliance with the requirements of Section 271 can only be accomplished on the basis of actual performance, documented in a substantive record.²⁹ As the FCC has expressly held mere paper promises are inadequate for § 271 compliance.³⁰ The Department of Justice also

²⁵ In the June 24, 1999 filing, the DSL CLECs noted with dismay that in SWBT's revised proposed DSL Attachment, SWBT had unilaterally decided *not* to make any of the changes or deletions ordered by the Texas PUC Staff at the June 14-15 collaborative work session. These work sessions were not full day workshops, but rather afternoon or evening sessions that ended without significant agreement or progress. See Interim DSL Attachment to PIA Replacement to SWBT Attachment 25, Project No. 16251, June 24, 1999, at 2. Moreover, the CLECs underscored the concern that the 271 DSL Attachment should not prejudge the precise issues pending in the Rhythms/Covad arbitration. The CLECs asked that the Attachment be interim in nature until the completion of the arbitration. The Texas PUC approved this request, as reflected in Attachment 25 of the T2A.

²⁶ July 15 Open Meeting Transcript/Attachment 5 at 293-299.

²⁷ The arbitration award was issued by the Texas PUC staff on November 30, 1999. Despite two requests for rehearing by SWBT, January 27, 2000, the Texas PUC voted to accept the arbitrators award virtually in its entirety. SWBT Request for Briefing and Rehearing on Arbitration Award (Dec. 7, 1999) ("Dec. Request for Rehearing/Attachment 6") (appended as Attachment 6); Comments of Southwestern Bell Telephone Company Concerning Arbitration Award and Proposed Interconnection Agreements (Jan. 6, 2000) ("January 6 Comments/Attachment 7") (appended as Attachment 7) at 7. The actual order will be issued on February 7, 2000 and take effect pursuant to its terms, assuming no further action by SWBT to overturn the order.

²⁸ Thus, for instance, the T2A right now requires CLECs to agree to SWBT's spectrum management process. In contrast, under the final arbitration award, SWBT must dismantle its spectrum management system. (T2A Appended as Attachment 8).

²⁹ *BA-NY 271 Order* ¶ 37.

³⁰ *BA-NY 271 Order* ¶ 37; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20568-69 ("*Ameritech Michigan 271 Order*") ¶ 55.

requires actual performance.³¹ Nevertheless, SBC's § 271 application relies extensively on promises regarding SBC's and promises about the future conduct, and future availability of systems and capabilities necessary for CLECs to compete.³² Moreover, contrary to the § 271 requirement for actual performance, many of the most important capabilities will not be available for at least a year. It is particularly important that the Commission reject SWBT's promises of future performance in light of SWBT's clear record of anticompetitive behavior in the DSL market in Texas.

SBC has refused to negotiate with competitors in good faith, improperly destroyed documents and suppressed information in the Rhythms/Covad arbitration, and opposed and appealed virtually every market-opening decision at the FCC, and in Texas, thereby delaying CLEC entry to the market. Indeed, during the arbitration, the Texas PUC imposed an unprecedented fine against SWBT for \$850,000 as a sanction for: 1) withholding numerous relevant, material documents; 2) providing witnesses who lacked knowledge about the company activities on which they were testifying; and 3) issuing an email³³ to 81 employees directing them to immediately destroy all documents and delete files from their computer that pertained to retail ADSL.³⁴ The e-mail ordering the destruction of documents was distributed on January 14, 1999, one week after Rhythms sent its first set of discovery requests to SWBT, and one month

³¹ “[A] mere ‘paper commitment’ to provide a checklist item . . . falls short of ‘providing’ the item as required by 271.” *In the Matter of Application of SBC Communications, Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma*, Evaluation of the United States Department of Justice, CC Docket No. 97-121 (May 16, 1997) at 23.

³² As one example of many, SBC concedes that its advanced services affiliate, ASI, is not currently using the same unbundled network elements and associated ordering systems as are used by CLECs, but asserts that it will do so “[a]s of February 28, 2000.” *SBC 271 Application* at 44.

³³ E-mail from Mari Quick, Corp. Manger of Product Development Jan. 14, 1999 (“*Document Destruction E-mail/Attachment 9*”)(appended as Attachment 9).

after Rhythms filed for arbitration. The Arbitrators ruled the e-mail should be admitted as an exhibit under the crime/fraud exception to attorney-client privilege. Rhythms is not aware that SWBT admitted the e-mail into the evidentiary record in this proceeding, even though it was introduced as an exhibit in the Texas § 271 proceeding.

Further SBC has exploited every ambiguity (real or imagined) in the Telecommunications Act or in the FCC's rule in order to leverage and extend the market dominance and exclude competitors. As a result, nearly three years after the 1996 Act, local telephone competition, including competition for xDSL services remains in its infancy in Texas. Indeed, Texas remains far behind other major states, like California and New York, in DSL deployment.³⁵

Given SBC's intransigence in complying with its legal duties, the Commission must hold fast to its policy of refusing to rely on paper promises by SBC.³⁶ For example, notwithstanding a mandate by the FCC,³⁷ and an explicit order by the Texas Arbitrators, SBC has not formally certified that it has dismantled its binder group management/selective feeder separation

³⁴ Texas Public Utility Commission, *Petition Of Accelerated Connections, Inc. d/b/a/ ACI Corp. For Arbitration To Establish An Interconnection Agreement With Southwestern Bell Company*, Docket No. 20226/20272, Order No. 20, at ¶ 4 (July 26, 1999) ("Sanctions Order/Attachment 10") (appended as Attachment 10).

³⁵ Even with the arbitration, Rhythms still does not have an interconnection agreement 20 months after it first began negotiations with SWBT. Without an interconnection agreement, SWBT was unwilling to accept orders from Rhythms for collocation. *Order Requiring Interim Agreement/Attachment 2* at 2. Thus, Rhythms was shut out of the xDSL market in Texas. Rhythms was finally allowed to begin placing collocation orders in June, 1998 prior to obtaining an interconnection agreement only because the Texas PUC intervened and ordered SWBT to enter into an interim agreement, which set a firm schedule by which SWBT had to provision collocation orders. *Interim Agreement Between Southwestern Bell Telephone Company and Accelerated Connections, Inc., (June 2, 1999)* ("Texas Interim Agreement/Attachment 11") (appended as Attachment 11). SWBT vigorously contested the Arbitrators' order, and filed an appeal contesting the authority of the Arbitrators to order it to enter an interim agreement. *Southwestern Bell Telephone Company's Appeal of Order No. 5 Interim Order, Petition of Accelerated Connections, Inc., d/b/a ACI corp. for Arbitration to Establish an Interconnection Agreement With Southwestern Bell Telephone Company*, Docket Nos. 20226 and 20272 (May 11, 1999) (appended as Attachment 12).

³⁶ *BA-NY 271 Order* ¶ 37.

³⁷ *Line Sharing Order* ¶ 216.

(“BGM/SFS”) program or indicated when or how it will do so. SBC only makes general assertions in its 271 application that it will— but has not yet — dismantled its BGM/SFS program. SWBT’s BGM/SFS process was employed to inventory its outside loop plant and select ranges of clean copper loops to be set aside in a binder group designated for ADSL service only – the single type of DSL supported by SWBT.³⁸ Because Rhythms and other CLECs provide several types of xDSL, they would be seriously disadvantaged by SWBT’s BGM/SFS program because a large number of clean loops would be tied up for ADSL use only.³⁹ The Arbitrators in Texas held that SWBT’s BGM/SFS process “has the effect of discriminating against deployment of xDSL services other than ADSL, especially in relation to the availability of clean copper loops for use by xDSL providers.”⁴⁰ SBC’s failure to dismantle its binder group management system evidences SBC’s continuing animus toward competitors.

SWBT takes a much more cooperative approach to DSL when it is being offered by its own retail operations. SWBT began providing retail ADSL in January 1999. In stark contrast to the negotiations for Rhythms and Covad, SWBT provided an interconnection agreement to its advanced services affiliate in only 30 days, and began offering service through the affiliate only five months after the company was created. Based on this behavior, it is clear that SBC’s conduct has not only enabled it to leverage its monopoly into the DSL market, but has denied data CLECs a “meaningful opportunity to compete” in Texas.

³⁸ See Affidavit of Carol Chapman filed in support of SBC’s 271 Application ¶ 54 (“Chapman Affidavit”). On January 19, 2000, more than a week after the 271 application was filed with the FCC, SBC representatives reconfirmed that the BGM system would be dismantled *in the future* in a handout provided to CLECs at a meeting regarding SBC’s compliance with the Merger Conditions. SBC and CLEC xDSL Collaborative, January 19, 2000, Synopsis of Issues by Category (“POR Issue Synopsis”) (appended as Attachment 13) at 15. SBC documents indicated that BGM *will be* dismantled.

³⁹ *Texas Arbitration Award/Attachment 4* at 47-48.

⁴⁰ *Texas Arbitration Award/Attachment 4* at 47. Thus, it is apparent that SBC did not “agree[] to eliminate its Selective Feeder Separation binder group management system.” Chapman Affidavit ¶ 6.

SBC has taken every opportunity to reverse or undermine the procompetitive provisions of the FCC and Texas Commission orders. Many of SBC's assurances that Texas markets are, or will be, open to competition depend on SBC fulfilling obligations at some future date. Given the continuing pattern of anticompetitive conduct, at a minimum, the Commission should require SBC to actually fulfill all such obligations before determining that SBC has met its requirements under § 271 to open markets to competition and to provide nondiscriminatory access to network elements.

DISCUSSION

I. LEGAL STANDARDS UNDER § 271

Under § 271, a BOC seeking authority to provide in-region interLATA services bears the burden of demonstrating that it has satisfied four requirements. First, it must demonstrate that it satisfies the requirements of either section 271(c)(1)(A), known as “Track A” or 271(c)(1)(B), known as “Track B.”⁴¹ Second, it must demonstrate that it has met each of the elements of the 14-point competitive checklist in section 271(c)(2)(b), a series of indicators that it has opened its local market to competition.⁴² Third, the BOC must demonstrate that approval of its 271 application is consistent with the public interest⁴³ and finally, that it will comply with the provisions of Section 272 of the Act, which requires BOCs to establish one or more separate affiliates to offer interLATA services.⁴⁴

⁴¹ 47 U.S.C. § 271(c)(1).

⁴² 47 U.S.C. § 271(c)(2)(b).

⁴³ 47 U.S.C. § 271(d)(3)(C).

⁴⁴ 47 U.S.C. § 272(d)(3)(B).

A. SBC Must Prove It Complies With All The Requirements of Section 271 For All Market Segments

This Commission has been explicit that SBC has the burden of proof, including the burden of coming forward with evidence and the burden of ultimate persuasion, to demonstrate by a preponderance of the evidence that all the requirements of § 271 have been met.⁴⁵ In the first instance this means that SWBT must come forward at the time of filing with *prima facie* evidence that is sufficient to demonstrate compliance with the competitive checklist and other § 271 requirements.⁴⁶ If SWBT is in fact able to make such a showing, opponents of SWBT's application must as a practical matter come forward with evidence and arguments to show that SWBT does not meet § 271 requirements.⁴⁷ But since SWBT retains the ultimate burden of proof on all issues, it must effectively rebut its opponents' claims.⁴⁸ If "the evidence is in equipoise after considering the record as a whole," SWBT will not have satisfied its burden of proof.⁴⁹

In addition, if SWBT's evidence responding to the concerns raised by new entrants or other commentators consists merely of *promises of future performance* it has no probative value and is not entitled to any weight.⁵⁰ Because the timing of a § 271 filing is solely within the applicant's control,

a BOC's promises of *future performance* to address particular concerns raised by commenters have no probative value in demonstrating its *present*

⁴⁵ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-region, InterLATA service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404 (rel. Dec. 22, 1999) (*BA-NY 271 Order*) ¶¶ 47-48; *Ameritech Michigan 271 Order* ¶ 45.

⁴⁶ *Ameritech Michigan 271 Order* ¶ 44.

⁴⁷ *Ameritech Michigan 271 Order* ¶ 44.

⁴⁸ *Ameritech Michigan 271 Order* ¶ 44.

⁴⁹ *Ameritech Michigan 271 Order* ¶ 46.

⁵⁰ *BA-NY 271 Order* ¶ 37.